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SETTING ASIDE OF ARBITRAL AWARD: SECURITY UNDER SECTION 37(7) AND THE "JUSTICE OF THE CASE" TEST

FGV PLANTATIONS (MALAYSIA) SDN BHD V MULTAZAM DEVELOPMENT SDN BHD [2026] CLJU 3115

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25th November 2026

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ISSUES

Where a party succeeds in obtaining an arbitral award, but the unsuccessful party subsequently applies to set it aside, section 37(7) of the Arbitration Act 2005 ("**AA 2005**") gives the High Court discretion to order that sums payable under the award be paid into court or otherwise secured pending determination of the application.

Section 37(7) of the AA 2005 provides as follows:

> *"Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into the High Court or otherwise secured pending the determination of the application."*

If the party challenging the award is already in financial difficulty, is that enough to justify an order for security, and what must the award creditor prove to obtain such an order?

In deciding whether to order security, how should the apparent merits of the challenge and the risk that delay may prejudice enforcement be balanced against the risk that a security order may prevent the challenging party from pursuing its application?

If the High Court dismisses the security application, can the award creditor appeal while the setting aside application is still pending? If so, in what circumstances may the appellate court interfere with the High Court's exercise of discretion?

These questions were considered by the Court of Appeal in **FGV Plantations (Malaysia) Sdn Bhd v Multazam Development Sdn Bhd [2026] CLJU 3115**.

BRIEF FACTS

- FGV Plantations (Malaysia) Sdn Bhd ("**FGV**") appointed Multazam Development Sdn Bhd ("**Multazam**") as the design and build contractor for an estate workers' housing project in Sarawak ("**Project**").

- Disputes arose between the parties concerning the performance of the Project, including the termination of the contract by FGV.

- As a result, Multazam referred the disputes to arbitration administered by the Asian International Arbitration Centre. Multazam claimed payment for unpaid work done and damages for wrongful termination, while FGV counterclaimed for damages for breach of contract.

- Following arbitration proceedings lasting approximately four and a half years, the Tribunal dismissed Multazam's claims and found in favour of FGV on its counterclaim, awarding FGV the following sums:

(a) Principal sum of RM12,517,317.10 with interest at 5% per annum from 11 January 2024 until full satisfaction;

(b) Representation costs of RM294,000.00; and

(c) Costs of the award of RM125,680.55.

("**Award**")

- Following the Award, Multazam applied to the High Court on 6 May 2024 to set aside the Award pursuant to section 37 of the AA 2005 ("**Setting Aside Application**").

- On 2 July 2024, FGV commenced an application in the High Court to enforce the Award pursuant to section 38 of the AA 2005 ("**Enforcement Application**"). FGV simultaneously applied for security under section 37(7) of the AA 2005 in the Setting Aside Application ("**Security Application**").

- The High Court heard the Security Application ahead of the Setting Aside Application and the Enforcement Application, which were to be heard together.

PROCEEDINGS BEFORE THE HIGH COURT

FGV relied on a Companies Commission of Malaysia search to show Multazam's weak financial position. FGV argued that Multazam had no intention of honouring the Award and sought to set it aside merely as a tactic to delay payment. Multazam contended that the Security Application was a tactical manoeuvre to deny it a reasonable opportunity to be heard in relation to the Setting Aside Application.

In this regard, the High Court applied the *"justice of the case"* test, drawing on *Mechanalysis Sdn Bhd (In Liquidation) v Appraisal Property Management Sdn Bhd* [2016] 11 MLJ 566.

In balancing the prejudice to the respective parties, the High Court held that Multazam's impecuniosity, which FGV had been aware of since the inception of the Project, was insufficient to justify an order for security. The risk of Multazam being denied the opportunity to pursue the Setting Aside Application outweighed FGV's possible inability to enforce the Award.

The High Court dismissed the Security Application with costs in the cause. FGV appealed.

DECISION THE COURT OF APPEAL

- **APPEALLABILITY OF THE HIGH COURT'S DECISION AND SCOPE OF APPELLATE REVIEW**

Multazam raised a preliminary objection that the decision of the High Court was not an appealable decision under sections 3 and 67 of the Courts of Judicature Act 1964, read together.

The Court of Appeal found no merit in the preliminary objection as the decision was, in substance, an ultimate order made pursuant to an interlocutory application, rather than an intermediate ruling made in the course of hearing a cause or matter. The Court of Appeal regarded the Security Application as a matter in its own right:

> *"20. After due consideration, we find no merit in the preliminary objection because we find that the decision is in substance an ultimate order made pursuant to an interlocutory application but not a ruling intermediately made in the course of the hearing of a cause or matter. In this regard, the Security Application is in our view itself a matter."*

However, in considering an appeal against the exercise of judicial discretion, the Court of Appeal, citing ECM Libra Investment Bank Bhd v Foo Ai Meng & Ors [2013] 3 MLJ 35, emphasised that its initial function was one of review only, there being no original discretion vested in the appellate court. It was incumbent upon FGV to demonstrate that the High Court had erred in the exercise of its discretion and that appellate interference was warranted.

- **THE "JUSTICE OF THE CASE" TEST UNDER SECTION 37(7) OF THE AA 2005**

The Court of Appeal noted that there was no prior appellate decision on section 37(7) of the AA 2005 and further observed that the High Court had applied the *"justice of the case"* test adapted from *Mechanalysis Sdn Bhd (In Liquidation) v Appraisal Property Management Sdn Bhd* [2016] 11 MLJ 566, which concerned the now-repealed section 42(8)(b) of the AA 2005. The Court of Appeal also noted that the High Court in *Hiform (M) Sdn Bhd v TSR Bina Sdn Bhd* [2024] CLJU 2469 had adopted a similar approach in achieving justice between the parties by reference to the facts and circumstances of the particular case.

In affirming that an application for security under section 37(7) of the AA 2005 is discretionary in nature, the Court of Appeal endorsed the *"justice of the case"* test applied by the High Court.

- **RELEVANT CONSIDERATIONS IN APPLYING THE "JUSTICE OF THE CASE" TEST**

In elaborating on the *"justice of the case"* test, the Court of Appeal identified two principal considerations to be balanced, namely the prima facie merits of the application to set aside the arbitral award and whether the delay occasioned by such an application would prejudice the award creditor's ability to subsequently enforce the award.

In assessing the latter, the Court of Appeal distinguished between an award debtor's existing financial weakness and the risk of enforcement being prejudiced during the pendency of the setting aside application. Mere impecuniosity is insufficient to justify an order for security. Rather, the award creditor must demonstrate how the delay would prejudice its ability to enforce the award, such as by showing a deteriorating ability on the part of the award debtor to honour the award or movement of assets:

> *"27. We are of the view that this "justice of the case" test requires the court, on the one hand, to look at* ***whether the losing party's setting aside application is prima facie flimsy, speculative and unmeritorious. Security should be ordered if the challenge on the arbitral award is tactical to stall payment of the award balanced against the court, on the other hand, to assess whether the delay caused by the setting aside application prejudices the winning party's ability to subsequently enforce the award.*** *Crucially, it is insufficient to simply demonstrate that the losing party is financially weak.* ***The winning party must demonstrate the losing party's ability to honour the arbitral award is actively deteriorating or that assets are being moved.*** *The losing party is likely not required to provide security if it is an on-going and profitable entity as that found in BBW v. TSS [2024] CLJU 2100 but that does not conversely mean that the losing party must automatically provide security if it is impecunious."*

In applying the *"justice of the case"* test to the facts of the present case, the Court of Appeal found that it was not plain and obvious that Multazam's Setting Aside Application was untenable. Furthermore, notwithstanding Multazam's impecuniosity, FGV had been aware of Multazam's weak financial position since the inception of the Project and there was no evidence of asset dissipation to frustrate the enforcement of the Award.

In these circumstances, the Court of Appeal found that the delay occasioned by the Setting Aside Application did not materially prejudice FGV and that the High Court had not erred in concluding that the risk of Multazam being denied the opportunity to pursue its Setting Aside Application outweighed FGV's inability to immediately enforce the Award:

> *"28. Consequently, upon our review of the learned High Court judge 's analysis and finding, we do not find there has been an error in the exercise of discretion in applying the "justice of the case" test on the facts herein. It is not plain and obvious that the Respondent's Setting Aside Application is untenable.* ***Albeit the Respondent is financially impecunious, this does not per se justify the Security Application.*** *Furthermore, we observed that* ***the Appellant has been aware of the Respondent's weak financial position since the inception of the Project and there is no evidence adduced by the Appellant to show that the Respondent dissipated its assets to frustrate the Appellant from enforcing the Award****. The delay in awaiting the conclusion of the Setting Aside Application does not materially affect the Appellant in the circumstances here. Thus, the learned High Court judge is not in error concluding that the risk of the Respondent having been denied the opportunity to pursue its Setting Aside Application outweighs the Appellant's inability to forthwith enforce the Award."*

The Court of Appeal also acknowledged, with reference to *Cahaya Kelang Construction Sdn Bhd v Worldwide Holdings Sdn Bhd* [2010] AMEJ 0711, that section 37(7) of the AA 2005 is intended to prevent frivolous applications to set aside arbitral awards or applications where the award debtor has no intention of honouring the award. However, the Court of Appeal was not satisfied that these circumstances had been established in the present case.

The Court of Appeal found that appellate interference was not warranted and dismissed the appeal. The High Court's decision was affirmed with costs.

KEY TAKEAWAYS

The key takeaways from the Court of Appeal's decision are as follows:

(a) **The dismissal of an application for security under section 37(7) of the AA 2005 is appealable.** However, the appellate court's function is one of review only. The appellant must demonstrate an error in the exercise of judicial discretion that warrants appellate interference.

(b) **An order for security under section 37(7) of the AA 2005 is discretionary and governed by the *"justice of the case"* test.** In exercising its discretion, the court considers the prima facie merits of the setting aside application, the prejudice that the delay may occasion to the award creditor's ability to enforce the award and the risk that an order for security may deprive the award debtor of the opportunity to pursue its application.

(c) **Mere impecuniosity of the award debtor is insufficient to justify an order for security**. The award creditor must demonstrate how the delay occasioned by the setting aside application would prejudice its ability to enforce the award, such as by showing a deteriorating ability on the part of the award debtor to honour the award or movement of assets.

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